

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

HELEN KENNEDY)	
Claimant)	
VS.)	
)	Docket No. 166,381
KREEKSIDE MANOR APARTMENTS)	
Respondent)	
AND)	
)	
TRAVELERS INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Both claimant and respondent appeal from the Award entered by Administrative Law Judge Robert H. Foerschler on April 10, 1997. The Appeals Board heard oral argument October 21, 1997.

APPEARANCES

Kathryn P. Barnett of Kansas City, Kansas, appeared on behalf of claimant. Stephen P. Doherty of Kansas City, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ awarded benefits based on a 16 percent general body disability. On appeal, respondent disputes the finding that claimant suffered an accidental injury arising out of and in the course of her employment. The parties agreed at the time of oral argument that if the Board finds claimant did suffer a compensable injury, claimant has a 16 percent general body disability. In her application for review, claimant contends the Award should require respondent to pay for past medical expenses.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board finds claimant has not proven by a preponderance of the credible evidence that she suffered accidental injury arising out of and in the course of her employment and concludes the Award should be reversed.

Claimant testified that on May 7, 1992, she fell when she twisted to avoid a small child just beneath her. From the fall, she claims injury primarily to her right shoulder, neck, and left knee. The Board is not persuaded by claimant's testimony. Claimant describes the accident differently at the various hearings held in this case. Other witnesses directly contradict claimant's testimony. Finally, the evidence establishes claimant did not give notice of an accident until after she had been terminated and after she threatened that the employer would be sorry for terminating her.

Claimant first testified about the accident at the preliminary hearing of August 25, 1992. She there stated that the fall occurred while she was getting a drink of water. As she turned to throw her cup away, the child of one of the residents, talking nearby on the phone, came up behind her. She turned and twisted to keep from falling on the child, fell into the counter, slid down up to her neck, and fell into a large ceramic pot underneath the counter. She ended up in a heap on the floor. According to claimant's first testimony, something snapped as the counter hit her neck and when she went to push off the counter she had no strength in her right arm. Claimant also testified that the nearby mother of the child, Mrs. Phyllis Wilson, would have heard the commotion because she yelled, the child cried, and a cat ran away.

In later testimony, claimant testified she did not fall all the way to the ground. She testified she pushed herself up with her left arm. She testified she heard a pop in her shoulder as she pushed up. Her right shoulder was allegedly the one injured. She also minimized the commotion and suggested Mrs. Wilson might not have seen the event. This later testimony was given after Mrs. Wilson testified to a different version of the events.

The ALJ concluded the various versions of the events given in claimant's testimony were not so diverse that the testimony should be disregarded. He indicated individuals often do not remember well enough to give precisely the same description each time. The Board likely would agree with this assessment if it were not for other evidence which directly contradicts claimant's testimony.

Phyllis Wilson testified that she did not see claimant fall. She saw claimant turn around after getting a drink of water and reach back to catch herself on the counter when she saw the child.

Jerry L. Young, one of her coworkers, testified claimant told him she had injured her back, arm, and shoulder months earlier playing football. According to Mr. Young, she was taking pain medication for the shoulder injury at the time of the alleged accident.

Claimant first testified she tried to report the accident to the manager, Ms. Luanna S. Davis, but did not because Ms. Davis was busy. Claimant later testified she did not see Ms. Davis the day of the accident. Ms. Davis testified she was there and was available had claimant wanted to give notice.

Finally, claimant was terminated the day after the alleged accident, before she had given notice of the accident. At the time of her termination, claimant threatened that they would be sorry for this.

Based on the record as a whole, the Board finds claimant has not established by a preponderance of the credible evidence that she met with personal injury by accident arising out of and in the course of her employment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler entered on April 10, 1997, should be, and hereby is, reversed.

IT IS SO ORDERED.

Dated this ____ day of May 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kathryn P. Barnett, Kansas City, KS
Stephen P. Doherty, Kansas City, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director